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IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

BOLLEY JOHNSON, *et al.*,
Appellants,
v.
MIGUEL DE GRANDY, *et al.*,
Appellees.

On Appeal from the United States District Court for the Northern District of Florida

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW IN SUPPORT OF APPELLEES

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW IN SUPPORT OF APPELLEES

The Lawyers' Committee for Civil Rights Under Law seeks leave to file the annexed brief as *amicus curiae* in support of the appellees.

The Lawyers' Committee is a non-profit organization created in 1963 at the request of the President of the United States to involve private attorneys throughout the country in the national effort to assure equal rights to all Americans. Protection of the voting rights of citizens has been an important aspect of the work of the Committee. The Committee has provided legal representation to litigants in numerous voting rights cases throughout the nation over the last 30 years, including cases before this Court, *see, e.g., Clark v. Roemer,* 500 U.S. ——, 111 S. Ct. 2096 (1991); *Clinton v. Smith,* 488 U.S. 988

(1988); *Connor v. Finch*, 431 U.S. 407 (1977). The Committee has also participated as *amicus curiae* in other significant voting rights cases in this Court, *see, e.g., Thornburg v. Gingles*, 478 U.S. 30 (1986); *Rogers v. Lodge*, 458 U.S. 613 (1982); *City of Mobile v. Bolden*, 446 U.S. 55 (1980).

Although the Committee is not a party to this appeal, the Committee represented several African-American citizens in other aspects of the Florida redistricting litigation that led to the appeals now before this Court.[1] The issues presented in this appeal are of great importance to the Committee's work on behalf of minority voters throughout the nation. In its effort to overturn the judgment below, Florida seeks the adoption of a greatly enlarged *per se* defense to Section 2 claims based on alleged proportional representation of Hispanics, a minority group that did not elect its first representative to the state legislature until 1982. Further, Florida and its *amici* urge this Court to limit challenges to legislative redistricting schemes based on the fundamentally mistaken notion that enforcement of the Voting Rights Act is somehow responsible for racially polarized voting and racial politics, rather than a necessary response to those conditions. These arguments ignore the historical record of minority exclusion from equal political opportunity that guided Congress in amending Section 2 of the Voting Rights Act in 1982, and threaten the hard-won progress that has been made under the Voting Rights Act in securing equal access to the political process for minorities. Finally, Florida urges a highly restrictive interpretation of the manner in which minority voters may satisfy the first of the factors set forth in this Court's decision in *Thornburg v. Gingles*. Florida's interpretation misconstrues the *Gingles* standard and is at odds with the broad remedial purpose of the Voting Rights Act.

Acceptance of the appellants' arguments would impair the Committee's ability to vindicate the rights of the minority citizens it represents throughout the nation. The Committee therefore has a substantial interest in the outcome of this case. We accordingly request that this motion for leave to file the attached brief be granted.

Counsel for appellants Florida House of Representatives and the Executive Appellants, as well as counsel for the De Grandy appellees, the United States, and the Florida State Conference of NAACP Branches, *et al.* have consented to the filing of this brief.[2]

Respectfully submitted,

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[1] The Committee represented Gwen Humphrey and other intervenors (collectively referred to as the "Humphrey intervenors") in the proceedings below. In those proceedings, the claims of the Humphrey intervenors were limited to the dilution of African-American voting strength in the Florida House districts drawn in Escambia County and the Florida Senate districts drawn in the Tampa Bay area. Thus, while the Committee did not assert claims with respect to the Dade County area, it participated in the trial that resulted in this appeal and those in Nos. 92-767 and 92-593.

[2] The letters of consent have been filed separately with the Court. In view of the large number of parties listed in this matter, we have also filed this motion out of an abundance of caution.

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BRIEF *AMICUS CURIAE* OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW IN SUPPORT OF APPELLEES

INTEREST OF AMICUS CURIAE

The interest of *amicus curiae* is set forth in the accompanying motion for leave to file brief *amicus curiae*.

SUMMARY OF ARGUMENT

This Court should reject appellants' arguments seeking the adoption of a greatly enlarged *per se* defense of proportional representation in cases brought under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. Those arguments are inconsistent with this Court's decision in *Thornburg v. Gingles*, 478 U.S. 30 (1986), and conflict with the policies underlying Section 2.

Contrary to the arguments of appellants and their *amici*, a district court does not adopt an improper principle of "maximizing" minority voting strength whenever it rules that the failure to create additional minority districts violates Section 2. To the contrary, courts act well within the bounds of their discretion under Section 2 when they examine districting plans to determine if they have a discriminatory impact on minorities. That examination is properly conducted under the standards set forth in *Gingles*. Neither proportional representation nor the lack of it is the touchstone for this analysis.

Appellants and their *amici* also err in suggesting that a court's findings on the three factors identified as central to Section 2 claims in *Gingles* should be treated as minor technical matters in the ultimate vote dilution inquiry. To the contrary, a court's findings on the three *Gingles* factors—including findings of highly racially polarized voting and the inability of minority voters to elect candidates of their choice in districts where they do not comprise a majority of the population—are properly entitled to great weight in an ultimate finding of vote dilution. Those findings are direclty tied to the question of whether minority voters have an equal opportunity to elect candidates of their choice to office, the statutory standard for a Section 2 claim.

In this case, the district court properly considered the presence of the *Gingles* factors, as well as strong evidence of other factors relevant under the totality of circumstances test of Section 2, in concluding that Florida's redistricting plan violated Section 2. As the district court found, racial and ethnic factors predominate over all others in Dade County politics. Indeed, because of racially polarized voting patterns, not a single Hispanic legislator was elected from South Florida until 1982, when Florida replaced its multi-member legislative districts with single-member districts. The undisputed facts show that even the remedial plan adopted in this case would not provide Hispanics in Florida with proportional representation.

This Court should also reject appellants' efforts to engraft new and unwarranted requirements onto the first *Gingles* factor—whether minorities are sufficiently numerous and geographically compact to form a majority in a single-member district. The district court's finding that additional districts could be drawn containing effective Hispanic voting majorities was not clearly erroneous. Imposing on Section 2 plaintiffs the heightened evidentiary requirement of demonstrating that single-member districts containing citizen voting age majorities can be created is inconsistent with this Court's reasoning in *Gingles* and is not required by the language of Section 2.

ARGUMENT

I. FLORIDA DID NOT ESTABLISH A VALID DEFENSE OF PROPORTIONAL REPRESENTATION

A. The Vote Dilution Claim in this Case Is Not Based on a Principle of Maximizing Minority Voting Strength

Under the pretense of challenging a dangerous "principle" of "maximizing minority voting strength" supposedly adopted by the court below, Florida seeks this Court's endorsement of a dramatically enlarged *per se* defense to Section 2 claims. *See* Brief of Appellants at 29-30. The district court, however, embraced no "maximization" principle. At bottom, Florida's claim is merely that the district court erred by not finding that Hispanics enjoy proportional representation under the state's reapportionment plan. No such finding was compelled by the facts, however, as we discuss in Section I.C., *infra*. The state's arguments to the contrary rest on an unwarranted expansion of the limited defense of proportional representation recognized in *Thornburg v. Gingles*, 478 U.S. 30 (1986).

Before turning to that essentially fact-bound issue, however, it is necessary to address the exaggerated claims of Florida and its *amici* concerning the so-called "maximization principle" they erroneously attribute to the dis-

trict court or, at some points, to this Court's decision in *Thornburg v. Gingles*. The district court, according to these claims, determined the existence of a Section 2 violation by ascertaining whether Florida had created the maximum possible number of minority districts and invalidating the state's redistricting plan upon finding that it had not.[1]

The district court nowhere referred to or embraced any such "maximization" principle; indeed, it carefully followed the *Thornburg v. Gingles* standards which this Court recently ruled applicable to redistricting cases. *See Growe v. Emison*, 507 U.S. ——, 113 S.Ct. 1075 (1993); *Voinovich v. Quilter*, 507 U.S. ——, 113 S.Ct. 1149 (1993). Florida and its *amici* simply invite this Court to hold that an illicit "maximization" principle has been adopted whenever a court rules that the failure to create additional minority districts violates Section 2. The invitation should be rejected. Courts act well within the bounds of their discretion under Section 2 when they examine redistricting plans to determine if they have a discriminatory impact on minorities. *See, e.g., Jeffers v. Clinton*, 730 F. Supp. 196 (E.D. Ark. 1989) (three-judge court), *aff'd mem.* —— U.S. ——, 111 S.Ct. 662 (1991) (Arkansas legislative redistricting plan deprived minority voters of equal opportunity to elect candidates of choice); *Jordan v. Winter*, 604 F. Supp. 807 (N.D. Miss.) (three-judge court), *aff'd mem. sub nom. Mississippi Republican Executive Comm. v. Brooks*, 469 U.S. 1002 (1984) (Mississippi congressional redistricting plan unlawfully limited minority voting strength). These cases, and others,[2] all involved claims that redis-

[1] Like the state, *amici* American Jewish Congress and B'nai B'rith repeatedly refer to the "maximization standard" allegedly "adopted" by the district court. *See, e.g.*, Brief of American Jewish Congress ("AJC") at 5, 23; Brief of B'nai B'rith at 19.

[2] *See also, e.g., Major v. Treen*, 574 F. Supp. 325 (E.D. La. 1983) (three-judge court) (congressional redistricting plan); *Ketchum v. Byrne*, 740 F.2d 1398 (7th Cir. 1984), *cert. denied*, 471 U.S. 1135 (1985) (Chicago city council redistricting plan); *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990), *cert. denied*, —— U.S. ——, 111 S.Ct. 681 (1991) (Los Angeles County Commission redistricting plan); *Rybicki v. State Bd. of Elections*, 574 F. Supp. 1147 (N.D. Ill. 1983) (three-judge court) (Illinois legislative redistricting plan).

tricting plans violated the Voting Rights Act by unduly limiting the number of districts in which minority voters would have an opportunity to elect candidates of choice to office. Both before and after this Court's decision in *Gingles*, such claims have been well within the mainstream of Section 2 jurisprudence.[3]

Florida and its *amici* fail to suggest a principled basis for determining when a Section 2 challenge to a redistricting plan is based on an impermissible "maximization" theory, and when it instead is meritorious. Courts should neither apply a maximization principle, nor presume that any increase in the number of majority minority districts in a plan is an illicit foray into racial "segregation."[4] The very purpose of this Court's decision in *Thornburg v. Gingles* was to set out standards that would be used for establishing the dilutive effect of an electoral structure, instead of automatic presumptions based on proportional representation or the lack of it.

[3] Cases challenging the dilution of minority voting strength in single-member district plans were also regularly litigated prior to the amendment of Section 2 in 1982. *E.g., Robinson v. Commissioners Court*, 505 F.2d 674 (5th Cir. 1974) (failure to create majority black county commissioners' district unlawfully diluted minority voting strength).

[4] As Justice Stevens noted in *Mississippi Republican Executive Comm. v. Brooks*, the fact that a court orders a districting plan that increases minorities' opportunity to elect a candidate of choice does not mean that the district court has embraced a requirement of proportional representation, 469 U.S. at 1004 (Stevens, J., concurring).

B. *Thornburg v. Gingles* Provides the Appropriate Framework for Analysis of Challenges to Redistricting Plans

Amici AJC and B'nai B'rith attack *Gingles* itself and urge that its standards should be rewritten with respect to single-member district plans. This Court, however, has specifically confirmed that the *Gingles* framework applies in Section 2 challenges to redistricting plans. *Growe v. Emison*, 507 U.S. ——, 113 S.Ct. 1075; *Voinovich v. Quilter*, 507 U.S. ——, 113 S.Ct. 1149. And the guidelines set out in *Thornburg v. Gingles* have not failed merely because Florida believes it has a defense of proportional representation to which the district court gave insufficient weight.

Amicus AJC states that the court below created additional Hispanic districts in South Florida "merely because all three *Gingles* criteria could be satisfied in an additional two districts." Brief of AJC at 19. This statement is not only flatly incorrect—the court made numerous specific findings on the other factors Congress identified as relevant to a Section 2 violation[5]—but also totally misunderstands the significance of the three *Gingles* criteria. In *amicus* AJC's terminology, the district court found a Section 2 violation "merely" because voting is racially polarized, with Anglos bloc voting to a high degree against candidates preferred by Hispanics; "merely" because Hispanic voters have an opportunity to elect candidates of their choice only in districts with Hispanic majorities; "merely" because ethnic factors predominate over all others in Dade County politics; "merely" because Florida in addition has a long history of language-based discrimination against Hispanics, continuing to the present day; "merely" because Hispanics continue to be disadvantaged by substantial economic disparities between Hispanic and non-Hispanic white citizens in South Florida;

[5] *See* Appendix to Jurisdictional Statement ("J.S. App.") at 30a-55a.

and "merely" because overt racial appeals continue to pervade election contests between Hispanic and non-Hispanic candidates in the 1990s in South Florida.[6]

We submit that these are not minor considerations. The court's findings on the three *Gingles* factors—particularly its findings of highly racially polarized voting and the inability of Hispanic voters to elect candidates of their choice in any but Hispanic-majority districts—properly carry great weight in an ultimate finding of vote dilution. As this Court found in *Gingles*, the presence of racial bloc voting and the predictability of the defeat of minority-preferred candidates is at the core of a dilutive electoral structure. 478 U.S. at 48-51. Where such factors are present—and this is particularly true in the highly ethnically polarized politics of South Florida—the ethnic composition of a district may, for better or worse, control the outcome of elections in that district. It is precisely for this reason that Florida did not elect its first Hispanic representative to the Florida House this century until 1982 (*see* Stipulated Facts, J.A. at 27), its first Hispanic state senator until 1988 (*see In Re: Constitutionality of Senate Joint Resolution 26, Special Apportionment Session 1992*, No. 79,674, slip op. (Fla. S.Ct. May 13, 1992) (Shaw, C.J., dissenting), J.S. App. at 133a), and its first Hispanic congressional representative until 1989 (*see* Affidavit of Dario Moreno, J.A. at 186-190).

For these reasons, although the *Gingles* factors are not the only factors a court may consider under Section 2, they are far more than minor technical elements in the final vote dilution determination. Those factors are not only the starting point for a Section 2 claim, but are central in determining whether an electoral structure unlawfully dilutes minority voting strength. The existence of racially polarized voting, and the persistent inability of

[6] *See* J.S. App. at 49a-51a, 53a, 79a; Affidavit of Dario Moreno, Joint Appendix ("J.A.") at 175-77; Stipulated Facts, J.A. at 17.

minority voters to elect candidates except in majority minority districts, are directly tied to the question of whether minority voters have an equal opportunity to *elect* candidates of their choice to office—the statutory standard enacted in Section 2.[7] And there is nothing inherently alarming in a district court decision that finds a Section 2 violation based in part, although not exclusively, upon strong and undisputed evidence that racial and ethnic considerations predominate over all others in Dade County politics.

Amici AJC and B'nai B'rith, however, suggest that enforcement of the Voting Rights Act is responsible for racial politics; they contend that creating districts where black and Hispanic voters are in the majority "segregates" minorities and deprives them of the political influence they could otherwise wield. This social theory is advanced as the justification for adopting a restrictive interpretation of Section 2. In particular, this theory is argued to justify reworking this Court's Section 2 jurisprudence so that a favorable finding on the three key *Gingles* factors would barely allow minorities inside the door of the courthouse, with the main part of their burden of demonstrating a Section 2 violation still before them. *Amicus* B'nai B'rith

[7] Florida and its *amici* err in suggesting that proving the three *Gingles* factors is a minor technical matter entitled to little or no weight in a court's inquiry into the totality of circumstances. To the contrary, proof of the three *Gingles* factors is a substantial undertaking that ordinarily requires expert statistical analysis, fact testimony on the workings of the local political processes, and preparation of potential alternative redistricting plans meeting constitutional and statutory requirements. These are by no means minor evidentiary hurdles. *See, e.g., Overton v. City of Austin*, 871 F.2d 529, 537-38 (5th Cir. 1989) (proof failed to establish legally significant white bloc voting); *Sanchez v. Bond*, 875 F.2d 1488, 1493-94 (10th Cir. 1989), *cert. denied*, —— U.S. ——, 111 S. Ct. 340 (1990) (proof failed to demonstrate political cohesion among minority voters); *McNeil v. Springfield Park Dist.*, 851 F.2d 937, 944-45 (7th Cir. 1988), *cert. denied*, 490 U.S. 1031 (1989) (proof failed to establish ability to draw black majority single-member district).

even asserts that *Gingles* itself "lessens the prospects of long term cross-racial political unity" by recognizing racially polarized voting as a factor favoring a finding of vote dilution. Brief at 13.[8]

To attribute racial politics in Dade County, or elsewhere in the United States for that matter, to the creation of black and Hispanic majority districts is the sheerest fiction. Enforcement of Section 2 of the Voting Rights Act, and the creation of majority minority legislative If this were credible, Florida would be able to point to a long history of successful legislative races by minorities in white majority legislative districts predating the creation of majority minority districts. In fact, in Florida minority legislators have been elected almost exclusively from districts with majorities or near-majorities of minority citizens. *See* J.S. App. at 131a-133a (Opinion of Florida Supreme Court dated May 13, 1992, dissenting opinion of Shaw, C.J.). Indeed, not a single Hispanic legislator was elected to the Florida House of Representatives from South Florida this century until the state eliminated its multi-member legislative districts and instituted a system of single-member districts in 1982. Stipulated Facts, J.A. at 27.[9]

The near-total absence of Dade County minority legislators from the statehouse during the first eight decades of this century does not reflect an era of racial harmony that has been destroyed by enforcement of the Voting

[8] *See also* Brief of AJC at 53, which states that, as construed by *Thornburg v. Gingles*, the Voting Rights Act "is itself a factor in encouraging the politics of race." *See also id.* at 52: "Under the *Thornburgh* [sic] plurality rule, there is little incentive for minority candidates to assert positions which appeal to a broad cross section of the electorate and to engage in cross-racial coalition building, for doing so would undermine a claim for a far safer majority-minority district."

[9] Similarly, from 1885 through 1982, only two African-American representatives were elected to the legislature from Dade County. Stipulated Facts, J.A. at 27.

Rights Act, but merely the previous submergence of minority voting strength and political aspirations through dilutive countywide and multi-member legislative elections. Hence, to blame enforcement of the Voting Rights Act, and the creation of majority minority legislative districts starting in the mid-1980s, for racial politics and racially polarized voting is historically insupportable.[10]

Further, the social theory that minorities are better off in "integrated" districts—by which is usually meant districts where white voters are in the majority—provides no legitimate basis for this Court's interpretation of the Voting Rights Act. Congress amended Section 2 to permit minority voters to challenge an electoral practice or structure that denies them an equal opportunity to *elect* candidates of their choice to office. The alleged desirability of a different political goal provides no principled basis for ratcheting up the evidentiary hurdles minority voters must overcome to establish a violation of Section 2.

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[10] Compare Frank R. Parker, *Black Votes Count: Political Empowerment in Mississippi after 1965* 198 (1990) ("Historically, race has been the central theme of Mississippi politics. Writing in 1949, political scientist V.O. Key, Jr. concluded that 'the beginning and the end of Mississippi politics is the Negro.' . . . [T]he political massive resistance statutes of the 1966 session of the Mississippi Legislature, together with existing discriminatory election structures . . . erected strong barriers to the effectiveness of the new Black vote [after the passage of the Voting Rights Act of 1965]. . . . Overcoming these barriers took years of litigations. . ."); J. Morgan Kousser, *The Undermining of the First Reconstruction: Lessons for the Second, in Minority Vote Dilution* 27, 31 (Chandler Davidson ed., 1989) ("Reconstruction and post-Reconstruction Southern Democrats used at least sixteen different techniques to hamper black political power. . . . [and] some of them, adopted as long as a century ago, are still in effect. . . Although they all had the same purpose—the minimization of officeholding by black or black-influenced white officeholders—the specific schemes varied because of differences in the black percentage of the population and its geographic distribution.")

C. The State Did Not Make Out a Valid Defense Based on Alleged "Proportional Representation" of Minorities in the Florida House Plan

Thornburg v. Gingles indicates that sustained electoral success that has resulted in consistent proportional representation of minorities may be asserted as a defense to a Section 2 challenge. 478 U.S. at 77. Contrary to Florida's contention, however, the facts in this case did not require a finding that Hispanics have enjoyed "proportional representation" as a matter of law.

The context in which Florida asserts its defense of proportional representation is critical. Here, the district court found that appellees' proof satisfied all three *Gingles* factors, as well as relevant Senate Report factors, and ruled that the state's districting plan diluted Hispanic voting strength. Because the court's findings, including its ultimate finding of vote dilution, are protected by the "clearly erroneous" standard of review in Rule 52(a) of the Federal Rules of Civil Procedure, *Thornburg v. Gingles*, 478 U.S. at 79, the state's arguments concerning proportional representation can prevail only if the facts of this case required a finding of proportional representation as a matter of law. No such conclusion is supported by this record.

First, Florida's redistricting plan does not provide proportional representation to minorities in any sense recognized by this Court in *Gingles*. This Court recognized a defense of "sustained electoral success" in one of the multi-member districts at issue in *Gingles* where "the last six elections [had] resulted in proportional representation for black residents." 478 U.S. at 77. In that district, black residents constituted 36% of the population and had elected a black legislator to one of the district's three seats in each election for the previous 10 years. *Id.* at 74 n.35. Here, Hispanics constitute 12% of the population of Florida, and proportional representation in the 120-

member Florida House of Representatives therefore would consist of 14 seats. Florida's plan creates nine majority Hispanic House districts. Given these facts, it is unsurprising that Florida's defense of "proportional representation" was barely mentioned at trial and that the district court made no finding that Hispanics were proportionally represented in the challenged House plan.

Moreover, it is undisputed that prior to the 1992 elections Florida never had more than 7 Hispanic legislators from south Florida. *See* Stipulated Facts, J.S. App. at 27. No one argues that this constituted proportional representation for Hispanics. Indeed, prior to the 1992 redistricting, non-Hispanic whites in Dade County, who constitute less than a third of the county's population, comprised ten out of the twenty members of the Dade delegation to the state House. J.A. at 181 (Affidavit of Dario Moreno). Thus, even if the level of Hispanic representation in the state's current plan were "proportional," by no means has that level of representation been "sustained." The district court therefore did not err as a matter of law in declining to treat "proportional representation" as an absolute defense to Hispanics' Section 2 claim in this case.

Moreover, unless the district court was required to adopt the most restrictive of all possible interpretations of "proportional representation," Hispanics in Florida do not currently enjoy proportional representation under the state's plan. As noted above, with an Hispanic population of 12%, Florida now has nine districts out of 120 with a majority Hispanic population, or 7.5%. Florida's "proportional representation" defense therefore depends upon narrowing the focus either to Hispanic citizens of voting age—excluding any consideration of non-citizens or persons not yet of voting age—or to the Hispanic population percentages in the "Dade County area" rather than in the state as a whole. Neither of these measures is the only appropriate measure of proportional representation, and

accordingly the district court did not err by rejecting the state's proportional representation defense.

In determining whether a challenged plan provides proportional representation to minorities, it is appropriate to use total minority population as the measure of proportional representation. Total population is consistently used in this Court's one-person, one-vote jurisprudence as the measure of equal voting strength under the Fourteenth Amendment;[11] it is no less appropriate as a measure of equal voting strength under the Voting Rights Act. Indeed, recognizing an absolute defense of "proportional representation" based on the percentage of minority voting age population—putting aside the citizenship issue—would tend to create a built-in bias against minority representation, because minority groups tend to be younger on average than the white population. *See, e.g., Ketchum v. Byrne*, 740 F.2d at 1412.[12]

Persons ineligible to vote are nevertheless entitled to petition their legislators, to seek their assistance, and to endeavor to influence legislative policymaking. Capping minority representation in a redistricting plan by use of citizen voting age population instead of total population percentages would infringe those rights by treating those ineligible to vote as nonpersons.[13] *See Garza v. County of*

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[11] *See, e.g., Connor v. Finch*, 431 U.S. 407 (1977); *Richardson v. Burns*, 384 U.S. 73 (1966).

[12] In this case, the state's proportionality defense also fails if the statewide proportion of Hispanic residents of *voting age* (11.7%) may be a proper measure; again, only 7.5% of the House districts created have a Hispanic majority population. Only if *citizen* voting age population is the only appropriate measure of proportional representation can the state sustain its defense.

[13] Moreover, Florida itself uses total population as the measure for dividing its legislative seats among different regions of the state. Thus, recognizing a defense based on alleged proportional representation of citizens of voting age would allow the state to use inconsistent measures of voting strength for Hispanic and non-Hispanic citizens. Such differential treatment is clearly contrary to the policies behind the Voting Rights Act.

Los Angeles, 918 F.2d 763, 775 (9th Cir. 1990), *cert. denied*, —— U.S. ——, 111 S.Ct. 681 (1991). Florida has presented nothing to establish that the court was required to adopt such an approach in assessing the state's proportional representation defense.

Furthermore, the appropriate reference for the state's defense of "proportional representation" is the percentage of Hispanics in the state as a whole, not their percentage in an arbitrarily defined sub-region of the state. A statewide framework is the only neutral reference point for determining the existence of proportional representation in a statewide legislative redistricting plan. Using a smaller region as a reference is subject to endless manipulation, given that some area could always be defined in which minority voters would appear to enjoy proportional representation.[14] Indeed, courts applying Section 2 to redistricting plans routinely refer to statewide minority percentages in describing the degree of representation afforded to minorities, regardless of whether the minority group is concentrated in a particular area of the state. *Jeffers v. Clinton*, 730 F. Supp. at 198, 200-01 (comparing state's 16% black total population with 6 of 135 majority black House and Senate districts, although blacks are heavily concentrated in the southeastern portion of the state). *Cf. Shaw v. Barr*, 808 F. Supp. 461, 472 (E.D.N.C.), *prob. juris, noted sub nom. Shaw v. Reno*, —— U.S. ——, 113 S.Ct. 653-54 (1992) (comparing number of black majority districts in state's congressional plan with statewide black population, not merely with black population percentage in area where minority districts were drawn).

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[14] This case illustrates the inherent difficulty of choosing a subregion of the state as the reference point for measuring the proportionality of minority representation. Dade County cannot reasonably provide that reference point, because the state's plan itself contains districts that cross the Dade County line.

For all these reasons, Florida failed to make out a valid defense of proportional representation to the Section 2 vote dilution claim asserted by the United States and the *De Grandy* plaintiffs.

II. *GINGLES* FACTOR 1 IS SATISFIED BY PROOF THAT THE MINORITY GROUP COULD COMPRISE A MAJORITY OF THE VOTING AGE POPULATION IN ONE OR MORE ADDITIONAL SINGLE-MEMBER DISTRICTS, AND THE COURT SHOULD NOT ENGRAFT NEW REQUIREMENTS ONTO THE *GINGLES* TEST

The district court found that the proof offered by the United States and the minority plaintiffs established the presence of each of the three factors deemed central to a vote dilution claim in *Thornburg v. Gingles*. Florida's appeal, however, attacks the district court's findings as to *Gingles* factor 1—that is, the court's conclusion that the Hispanic population is "sufficiently large and geographically compact to constitute a majority in a single-member district." 478 U.S. at 50.

Even though Hispanics of voting age would constitute a minimum of 60% of the population in all 11 of appellees' proposed alternative districts, and the district court made detailed findings that the Hispanic population level in the proposed districts was sufficient to elect candidates preferred by Hispanics to office, Florida argues that *Gingles* factor 1 was not satisfied because some of the proposed alternative districts may not have majorities of Hispanic voting age *citizens*. On that ground alone, the state argues, the minority plaintiffs' vote dilution claim should have been rejected.

This argument invites the Court to engraft unwarranted evidentiary requirements onto the *Gingles* factor 1 analysis—requirements that are inconsistent with the purpose of the *Gingles* test and of amended Section 2. This Court should reject the state's contention.

The *Gingles* factor 1 test is unique among the three so-called *Gingles* factors; it is the only factor that has no source either in the text of the statute or among the relevant factors listed in the authoritative statement of Section 2's legislative intent, the Senate Report accompanying the 1982 amendment of the Voting Rights Act ("Senate Report"). *See* S. Rep. No. 417, 97th Cong., 2d Sess. 28-29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 206-07.[15] As a judicially developed test, *Gingles* factor 1 is designed to help structure the analysis of Section 2 claims, by ascertaining whether the minority group would have the potential to elect candidates of choice to office if the challenged electoral structure were altered. 478 U.S. at 50 n.17.[16] The restrictive interpretation of this factor urged by the state, however, would improperly transform the *Gingles* factor 1 analysis into a formidable obstacle to the full consideration of vote dilution claims. Such a restrictive interpretation is not justified by the Court's reasoning in *Gingles*. Moreover, given the lack of support for *Gingles* factor 1 in the text of Section 2 of the Senate Report, such a restrictive interpretation of *Gingles* factor

[15] *Gingles* factors 2 and 3, which ask whether the minority group is politically cohesive (based primarily on evidence of minority electoral support for particular candidates, 478 U.S. at 51) and whether white bloc voting generally defeats the candidates preferred by minority voters, *id.*, are drawn from Senate Report factors 2 ("the extent to which voting in the elections of the State or political subdivision is racially polarized"), and 7 ("the extent to which members of the minority group have been elected to public office in the jurisdiction"). S. Rep. No. 417 at 28-29, 1982 U.S.C.C.A.N. at 206-07. *See also* Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, as amended ("The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered").

[16] *See* Bernard Grofman & Lisa Handley, *Identifying and Remedying Racial Gerrymandering*, 8 J. of L. & Pol. 345, 376 (1992) ("[W]e may take a fifty percent voting age share district as presumptive evidence (albeit not the only possible evidence) of such a potential").

1 would undermine its legitimacy as a judge-made tool of analysis for Section 2 claims.

A. *Gingles* Factor 1 Does Not Require Proof of Citizen Voting Age Majorities

The state argues that because the word "citizens" appears in Section 2 of the Voting Rights Act,[17] *Gingles* factor 1 requires proof that the proposed alternative districts will have a majority of Hispanic voting age citizens. The fallacy of this argument is its assumption that *Gingles* factor 1 is a test set forth in Section 2 whose interpretation must therefore be controlled by the statutory language of Section 2.

That assumption is erroneous, because Section 2 nowhere states that minority citizens must prove that they would constitute any specific quantum of the population in a proposed single-member district as a precondition to establishing a violation of the section. *Gingles* factor 1 is a judge-made test, not a statutory requirement for a Section 2 claim. The manner in which the *Gingles* factor 1 test can be satisfied, therefore, depends upon the purpose for which the *Gingles* 1 test was created, not upon the use of the word "citizens" in the statute.[18] Thus, even if the word "citizens" in Section 2 is read as excluding lawsuits by noncitizens, that limitation is in no way con-

[17] "A violation . . . is established if, based on the totality of circumstances it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by [the Act]." 42 U.S.C. § 1973, as amended.

[18] Indeed, if the term "citizens" controlled the proper interpretation of *Gingles* factor 1, the state's argument would still fail. Section 2 uses the term "citizens," not "voting age citizens." Accordingly, if the statutory language is controlling of the proper interpretation of *Gingles* factor 1, plaintiffs need only prove that they would constitute a majority of the Hispanic *citizens* in the alternative single-member districts, not a majority of the *voting age* Hispanic citizens.

trolling of the question whether the alternative districts proposed by the appellees below were adequate to satisfy the *Gingles* factor 1 test.

B. Appellees' Proof Satisfies the Requirements of the First *Gingles* Factor

Appellees' proof unquestionably satisfied the literal terms of the *Gingles* test, which asks whether minorities could comprise "a majority in a single-member district." 478 U.S. at 50. Not only would Hispanics be in the "majority" in each of appellees' eleven proposed districts, but they would in fact constitute supermajorities of at least 64% in each district. This is true regardless of whether a simple majority of the population is adequate to satisfy *Gingles* factor 1, as the language of *Gingles* itself indicates, or whether voting age population is considered, as some cases interpreting *Gingles* have required. *See McNeil v. Springfield Park Dist.*, 851 F.2d at 944-45.

Moreover, in *Gingles* this Court explained that the purpose of *Gingles* factor 1 is to determine whether "minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice." 478 U.S. at 50 n.17 (emphasis in original). In this case, the district court specifically found that "eleven geographically compact [House] districts can be drawn in which Hispanics in Dade County would have the potential to elect candidates of their choice." J.S. App. at 68a. This factual finding is supported by expert testimony and by evidence of the past success of Hispanic-preferred candidates in districts with Hispanic population percentages similar to those in appellees' proposed districts. J.S. App. at 31a-32a, 39a-40a & n.28. This is enough to establish that appellees would have an enhanced opportunity to elect candidates of their choice to office under an alternative election system.[19]

[19] *See* Grofman & Handley, *supra* note 16, at 357 ("there must be an alternative to the challenged practice judged against whose baseline fairer representation would have been possible").

Indeed, this Court need look no further than the population percentages in the *state's* majority-Hispanic districts to reject the state's attack on the court's factual finding. In the state's plan, the nine majority Hispanic House districts in South Florida have Hispanic voting age population majorities ranging from 63.85% in District 107 to 83.64% in District 110. Defendants' Joint Exhibit 2, J.S. App. 206a-208a. The state argued throughout the litigation that these population percentages were sufficient to allow Hispanics to elect candidates of choice to office in all nine of these districts, including District 107; indeed, in this Court the state contends that Hispanic electoral success in these nine districts is so predictable as to provide Hispanics with proportional representation in the Florida House. Not one of the eleven districts proposed by appellees, however, has an Hispanic population percentage as low as that in District 107 of the state's plan. Instead, the eleven proposed districts range from 64.5% to 78.2% in Hispanic voting age population. *Id.* In other words, none of appellees' proposed districts—which allegedly were inadequate to satisfy *Gingles* factor 1—had an Hispanic majority as small as that in the state's District 107, a district which the state contends will *guarantee* the election of an Hispanic-preferred candidates for the remainder of the decade.[20] The state's argument that appellees' alternative districts failed to satisfy *Gingles* factor 1 is thus meritless for this reason alone.

Although the state produced statistical estimates indicating that Hispanic *citizen* voting age percentages might fall below 50% in some districts in an 11-district plan, that same analysis also estimated that three of the *state's* nine Hispanic majority districts fall below 50% in Hispanic citizen voting age population. J.S. App. at 206a-208a. Again, of all the South Florida House districts in

[20] Hispanic candidates were elected in each of the nine Hispanic majority districts in the state's plan.

all the plans analyzed by the state, the district with the *lowest* estimated Hispanic citizen voting age percentage was District 107 in the *state's* plan, with an Hispanic citizen voting age population of 46.74%. *Id.* at 206a. Moreover, all three majority Hispanic *Senate* districts in the state's Senate plan are *also* estimated to have less than 50% Hispanic citizen voting age populations. J.A. at 454 (state's Hispanic Senate districts range from 42.8% to 49.1% in Hispanic citizen voting age population). Thus, if the state's analysis establishes anything, it establishes that the level of Hispanic citizen voting age population estimated by the state's expert is not determinative of the question posed by *Gingles* factor 1—whether minorities would have "the *potential* to elect representatives" in the proposed alternative districts. 478 U.S. at 50 n.17 (emphasis in original).[21]

Furthermore, a focus on citizenship cannot be justified on the theory that the *Gingles* factor 1 majority must consist of eligible voters. Many persons of voting age are ineligible to vote for reasons other than citizenship: some voting age persons may not be year-round residents (a particularly pertinent category in Florida); some may be incarcerated for disqualifying felonies; some may be members of the armed forces or college students who maintain voting residence elsewhere; some may be homeless and therefore ineligible to vote in some states. If voting-age persons who are ineligible to vote must be excluded from the *Gingles* factor 1 equation, there is no principled

[21] Indeed, while the Florida House argues in this Court that no district with less than a 50% Hispanic citizen voting age population is capable of electing an Hispanic candidate of choice to office, the Florida Senate argues in this Court that a district with an African-American voting age population of 35.5%—and an unknown citizen voting age population—provides African-Americans with the opportunity to elect a candidate of choice to office. *See, De Grandy v. Wetherell*, No. TCA-92-40015-WS, slip op. (N.D. Fla. July 17, 1992) (three-judge court), J.S. App. at 65a; Florida Senate's Motion to Dismiss or Affirm at 25, *De Grandy v. Wetherell* and *United States v. Florida*, Nos. 92-593 and 92-767.

basis to exclude only those who are ineligible by virtue of noncitizenship, while not excluding persons who are ineligible to vote in the district for other reasons. Indeed, excluding noncitizens from the calculation would ordinarily tend to decrease the apparent Hispanic percentage of a district in South Florida, but excluding army personnel or part-year residents might well tend to *increase* the Hispanic population percentage. Accordingly, no balanced approach to *Gingles* factor 1 could warrant singling out citizenship to the exclusion of other eligibility criteria.

Thus, if the state's interpretation of *Gingles* factor 1 were correct, proof of that factor would presumably depend upon first establishing the total number of persons in the proposed district who are voting-age, U.S. citizens not disqualified from voting by felony convictions and who have year-round residences in the district and are not members of the armed forces or college students with voting residences elsewhere; and then determining the percentage of those persons who are Hispanic. Such an exercise is totally inconsistent with the threshold nature of the *Gingles* factor 1 test, and would transform that test from a useful tool of analysis into a mini-trial of demographic arcana. Florida's proposed gloss on the *Gingles* standard would thereby provide a potent weapon for defendant jurisdictions, forcing unwarranted expenditures by minority plaintiffs in order to survive even the first elementary step of the Section 2 analysis.

In *Allen v. State Bd. of Elections*, 393 U.S. 544, 567 (1969), this Court held that the Voting Rights Act should be construed in a manner that provides "the broadest possible scope" for eliminating racial discrimination. Florida's restrictive interpretation of the *Gingles* standard directly conflicts with this directive and should be rejected.

CONCLUSION

For these reasons, the judgment below should be affirmed.

Respectfully submitted,

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